IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 214 of 1994

with

CRIMINAL REVISION APPLICATION No 84 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

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2. To be referred to the Reporter or not? No.

3. Whether Their Lordships wish to see the fair copy of the judgement? No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No.

5. Whether it is to be circulated to the Civil Judge? No.

THE STATE OF GUJARAT

Versus

SURESHBHAI BECHARGIRI GUSAI

Appearance:

1. Criminal Appeal No. 214 of 1994

MR MA BUKHARI, APP, for the appellant.

MR KB ANANDJIWALA for the Respondents.

2. Criminal Revision ApplicationNo 84 of 1994

MR NV ANJARIA for Petitioner

MR MA BUKHARI, APP, for Respondent No. 1.

MR KB ANANDJIWALA for Respondents Nos.2 to 4.

CORAM : MR.JUSTICE K.R.VYAS and
MR.JUSTICE A.M.KAPADIA
Date of decision: 25/02/99

ORAL JUDGEMENT

PER: K.R.VYAS,J.

This appeal has been preferred by the State of Gujarat challenging the judgment and order dated 11-11-1993 passed in Sessions Case No.27 of 1989 by the learned Assistant Sessions Judge, Bhuj, acquitting the respondent-accused of the offences punishable under Sections 323, 307 , 326 read with section 114 of the Indian Penal Code.

Dinesh Naran Iyer (PW 1, Ex.12) the injured victim of the incident is the complainant in the present case. According to him on 30-1-1987, after closing his office situated in Azad Chowk, Mandvi town at about 9.00 or 9.15 p.m., when he came near Sagar Video, he was inflicted with knife blow on the back portion of the right hand underarm. He immediately turned back and saw that it was accused No.1. Accused No.1 at that time inflicted another blow on the front part of his right hand underarm. The complainant also saw that accused Nos.2 and 3 were present at that time. The complainant tried to raise shout for help. On hearing the shout , many persons , including Fakir Mamad (PW 6, Ex.20) and one Kirangar came there . The complainant was profusely bleeding. He was thereafter removed to a nearby office and was made to sit on an Ota. He was thereafter taken to Civil Hospital, Mandvi. Dr. Chandrakant Sadhu (PW 3, Ex.17) Medical Officer, Civil Hospital, Mandvi , examined the complainant and found two cut injuries of 2 x 1 cm on the back as well as on the front right portion of the right underarm. Considering the fact that the complainant was profusely bleeding and his condition was serious, Dr. Chandrakant Sadhu informed Mandvi Police Station. Pitamberdas Sharma, Police Station Officer of Mandvi Police Station recorded the information of Dr. Sadhu in the station diary, Ex.59. On the basis of the said information, Sr. PSI Gohil (PW 17, Ex.54) sent a Yadi to Ishverlal Joshi (PW 4, Ex.22) Dy Mamlatdar and Executive Magistrate and informed him to record the dying declaration of the complainant. Accordingly at 11.15 p.m. Ishverlal Joshi went to the Civil Hospital and after inquiring about the physical condition of the complainant from Dr. Sadhu, recorded the dying

declaration, Ex.21. PSI Gohil also went to the Civil Hospital and recorded the complaint,Ex.55, of the complainant . It appears that the complainant was thereafter removed to G.K.General Hospital, Bhuj where he was examined by Dr. Mahendragiri Goswami (PW 16, Ex.52) at about 12.20 a.m. Dr. Goswami removed the stitches of the wounds applied by Dr. Sadhu and found that axillary veins were injured. Dr. Goswami was also of the view that since the treatment in his hospital was not possible, he referred the complainant to Ahmedabad Civil Hospital for cardia vascular surgery. Since there was strike in the Civil Hospital, the complainant was treated by Dr.Jashbhai Panchal (PW 2, Ex.15) a private Surgeon of Ahmedabad and found the following injuries on the person of the complainant :

> "On admission, examination revealed fully conscious patient with pale looking tachycardia ++, B.P.90/70 mm, very huge haemotoma over the right infraclavicular and right upper arm, discoloration and oedema present over the lateral side of the right side of the chest wall, discoloration over the posterior part of the right upper arm, there is disminish motor function of the externsor muscle of the right wrist. The right radial and brachial artery pulsation absent. Looking at the above clinical picture and increasing haemotoma, it looks like there is axillary artery damage as well as neurological damage..."

Dr. Panchal on 1-2-1987 performed emergency operation on the complainant who was required to remain in the hospital from 1-2-87 to 25-2-87. According to Dr.Panchal the injuries were serious in nature and were possible by sharp cutting instrument. In the mean time PSI Gohil (PW 17) continued the investigation by preparing Panchnama Ex.56, of the injured complainant as well as his blood stained clothes and recovered the same and also recorded the statements of the witnesses. He also arrested accused No.2 at 2.45 a.m. on 31-1-87. He also prepared the Panchnama of the scene of offence Ex.43. As PSI Gohil was required to proceed on leave, he handed over further investigation to PSI Silajiya (PW 18, Ex.61) who continued the further investigation. According to his evidence, accused No.1 produced himself and also produced the knife used by him for causing injuries to the complainant. Arrest panchnama Ex.62 dated 19-2-87 was prepared by PSI Silajiya in presence of the two Panchas. After completion of the investigation on 26-4-1987, PSI Silajiya submitted a chargeshet against the accused to

the Court of the learned Judicial Magistrate, First Class, Mandvi. Since the accused were charged also for offence punishable under Section 307 IPC, the learned Magistrate committed the case to the Court of Sessions for trial.

The learned Assistant Sessions Judge framed the charge, Ex.1, against the accused for the offences punishable under Sections 307, 323, 326 read with section 114 of the IPC to which the accused pleaded not guilty and claimed to be tried. While denying the incident, accused No.1 in his further statement recorded under Section 313 of the Code of Criminal Procedure has stated that his name is Pravingiri Bechargigi and he is a left-hander. He has produced the documents to show that he is not Sureshgiri Bechargiri. In substance, it is the case of accused No.1 that since he is altogether a different person, he has been falsely involved in the present case.

The learned Assistant Sessions Judge, at the end of the trial after appreciating the evidence on record, including further statement of the accused, was of the view that the prosecution has failed to establish the charge against the accused. He therefore by his impugned judgment and order acquitted all the accused.

Mr.M.A.Bukhari, learned Additional Public Prosecutor appearing for the appellant-State, after taking us through the evidence of all the prosecution witnesses, submitted that the learned Assistant Sessions Judge has committed an error in appreciating the evidence of the prosecution witnesses. He submitted that in view of the enmity between the complainant and accused No.1 on account of the incident that took place during Navratri festival, accused No.1 was known to the complainant and, therefore, the complainant immediately identified acused No.1 as the assailant. There is therefore no question of any mistaken identity as held by the learned Assistant Sessions Judge. Mr.Bukhari highlighted the fact about the serious injuries sustained by the complainant at the hands of accused No.1 for which the complainant was required to undergo an emergency operation . In view of this, it was submitted by the learned Additional Public Prosecutor that even if the complainant is not corroborated by other eye witnesses, the complainant being an injured witness, his evidence is required to be accepted.

Mr. Anandjiwala, learned Advocate appearing for the respondent-accused, on the other hand has supported

the judgment and order of the learned Assistant Sessions Judge in toto.

Having closely scrutinised the evidence on record as well as the reasoning of the learned Assistant Sessions Judge, we are of the opinion that the learned trial Judge has mis-directed himself in reaching the ultimate conclusion by not properly appreciating the evidence on record and, therefore, interference is called for. We are conscious of the fact that this being an acquittal appeal and especially when the incident in question had taken place as back as on 30th January, 1987 and when the accused have been acquitted on 11-11-1993, if the view taken by the learned trial Judge is a plausible view, normally this Court does not interfere. However, in view of the evidence of the complainant which , in our opinion, is quite natural and believable inasmuch as he himself was an injured person and was required to take an expensive treatment , the accused, who are responsible for causing the injuries, cannot be allowed to be set free. In view of this, in our opinion, interference in this matter is necessary.

We have narrated the facts from the evidence of the prosecution witnesses and therefore with a view to avoid repetition, we do not deem it necessary to renarrate the facts. However, we will narrate the evidence of the prosecution witnesses with a view to appreciate their evidence in proper perspective at the appropriate place in this judgment .

The prosecution , with a view to corroborate the say of the complainant, has examined Fakir Mamad (PW 6, Ex.27). He is a rickshaw driver. According to him accused No.1 inflicted knife blows to the complainant when the complainant was near Regal Video in Azad Chowk. He is not sure as to who were the other accused alongwith accused No.1. This witness had taken the injured complainant in his rickshaw to the General Hospital. He has given the same place of injury on the person of the complainant as described by the complainant. He has frankly admitted that he does not know as to what was the motive for quarrel. He has been contradicted by his police statement. The learned trial Judge has not believed the evidence of this witness on the ground that this witness has given the place of the incident near Regal Video and also on the ground that he had appeared in number of cases as a Panch and, therefore, he is a man of the police. Reading the evidence of this witness, it also appears that this witness is a man of police. His services were utilised by the police to act as a Panch in

other matters also. Regarding the place of the incident, instead of giving the place near Sagar Video, he has stated Regal Video in his evidence for which he has been contradicted by his police statement. Merely because this witness has some connection with the police, that fact itself is not a ground to reject his evidence, especially when he had gone to the rescue of the complainant and had taken the complainant in his rickshaw to the hospital, especially when the fact of his taking the complainant to the hospital is corroborated by the complainant as well as Dr.Sadhu. Therefore, the reasoning of the learned trial Judge that the evidence of the complainant is not corroborated by any other eye witness is contrary to the evidence on record.

The learned trial Judge, it appears, has treated Ex.59 the entry in the station diary as the FIR and recorded a finding that the names of the accused have not been disclosed by the complainant and on the basis of the same the possibility of false implication of the accused cannot be ruled out. Ex.59, which is the entry in the station diary recorded by PSO Pitamberdas Sharma of Mandvi Police Station on the basis of the information received by him from Dr.Sadhu of Government Hospital, Mandvi, is the entry made at 21.45 hours. The said entry discloses that Dr.Sadhu has informed that a quarrel in Azad Chowk has taken place wherein Dinesh Naran Iyer aged 25 has been assaulted on hand as well as under-arm with knife by some one and that the complainant has been taken for treatment by his mother. Mr. Anandjiwala, while supporting the reasoning of the learned trial Judge, has invited our attention to the evidence of Dr. Sadhu Dr. Sadhu received the information from the complainant wherein the complainant had not given the names of any of the accused persons and he thereafter conveyed the said information to PSO who in turn entered the same in the stationa diary and on the basis of the same, investigation started. Mr. Anandjiwala, therefore, submitted that Ex.59 disclosed a cognizable offence and especially wnen the dying declaration was also recorded thereafter, Ex.59 itself is the FIR and since no names of the accused were disclosed at the earliest point of time, the accused cannot be made responsible for the alleged offences. In our opinion, Ex.59 cannot be treated as the FIR. The complainant Dinesh in his evidence has denied the suggestion in the cross-examination that he had stated to the doctor that he was asaulted by some one and had not disclosed the name of the asailants. Dr. Sadhu in his evidence has asserted that Dinesh informed him that he was assaulted by someone. However, Dr.Sadhu has not stated that Dinesh had not given the names of the

assailants. In view of this, it is quite reasonable to infer that Dinesh must have given the names of the assailants to Dr.Sadhu but for any reasons, Dr.Sadhu, without disclosing the names of the assailants, only conveyed the information about the incident to the police. When the author of the information i.e. the complainant himself has denied the suggestion that he had not disclosed the names of the assailants, it is not possible for us to accept the say of the doctor that he passed on the information which was supplied to him by the complainant. It may be stated that the complainant Dinesh had disclosed the names of the assailants in the complaint, Ex.55 recorded by the police as well as in the dying declaration, Ex.21, recorded by the Executive Magistrate without wasting further time after the incident. Therefore, in our opinion, Ex.55 is the FIR wherein the complainant disclosed the cognizable offence including the names of the assailants. Ex.59 is merely cryptic message conveyed by Dr. Sadhu. Therefore, it is not possible for us to hold the same to be FIR.

In Tapinder Singh vs State of Punjab AIR 1970 SC 1566, the Supreme Court was required to consider the case where the police received an anonymous telephone message at Police Station that firing has taken place at taxi-stand. Considering the facts and circumstances of that case, the Supreme Court was of the view that mere fact that this information was first in point of time does not by itself clothe it with the character of FIR. In the present case also merely because an information which is cryptic in nature was conveyed by Dr.Sadhu , that fact by itself cannot be branded as the first information. We may even add at this stage that the statement of the complainant which was recorded by the Executive Magistrate by way of a dying declaration, Ex.21, now cannot be treated as the dying declaration since the complainant has survived. However, the same does not lose the value of corroborating the complaint as well as the evidence of the complainant in view of Section 157 of the Indian Evidence Act. Since the complainant had clearly disclosed the names of the assailants in the statement made before the Executive Magistrate, which was his earliest version and the same is also corroborated by the complaint as well as the evidence, the learned Assistant Sessions Judge has committed an error in not appreciating in proper perspective the said facts.

That next question that arises for our consideration is regarding the identity of accused No.1.

Mr. Anandjiwala, learned Advocate for the respondents, has submitted that the prosecution has failed to establish the identity of accused No.1 inasmuch as accused No.1 is not Sureshgiri Bechargiri Gosai but his name is Pravingiri Bechargiri Gosai. Our attention has been invited to the list of documents produced by accused No.1 at Ex.64 at the time of recording his further statement wherein accused No.1 has produced the school leaving certificate, ration card and the driving licence. Mr. Anandjiwala tried to highlight the fact that the incident took place during night hours and there is no mention in the Panchnama about the availability of lights at the scene of offence and therefore, since there was no light , the complainant could not have identified accused No.1. In the submission of Mr. Anandjiwala, accused No.1 was arrested at the time when the complainant was taking treatment and since test identification parade was not held, it was not possible for the complainant to identify accused No.1 for the first time in the Court after many years. To substantiate this argument, reliance is placed by Mr. Anandjiwala on the decision of the Supreme Court in Karnail Singh and others vs State of Punjab AIR 1995 SC 1972. That was a case wherein there was some error in describing one of the accused by not properly mentioning the name of his father. Considering the facts and circumstances of that case, the Supreme Court did not interfere with the view taken by the High Court holding that the participation of the accused was doubtful and therefore benefit of doubt given to the accused by the High Court requires no interference. Perusing the documents produced by accused No.1, it appears that the name of accused No.1 was entered at the time of admission in the school as Pravingiri and the said name continued in the school leaving certificate as well as in the ration card and the driving licence. Except his name, the other particulars viz father's name and sirname as well as the residential address have remained the same. Reading the evidence of the prosecution witnesses, it appears that accused No.1 is also known as Sureshgiri may be his popular name. Thus, it appears to us that by putting forward Pravingiri as his , accused No.1 wants to take advantage of the situiation for denying his involvement in the commission of the crime by contending that he is Pravingiri and not Sureshgiri. Reading the evidence of the complainant, it appears that a quarrel had taken place between the complainant and accused No.1 during Navratri festival when accused No.1 had beaten the complainant. However, the complainant thought it to be an ordinary quarrel, did not file any complaint. According to the complainant, the present incident is the result of the earlier

incident. In view of this, accused No.1 is known to the complainant and, therefore, there is no question of any mistaken identity of accused No.1 by the complainant. On 19-2-87 when accused No.1 was arrested by the police, an arrest panchnama Ex.62 was drawn which reveals that on being asked about the name and address, the accused No.1 introduced himself as Sureshgiri Bechargiri Gosai of Mandvi. It is true that the Panchas have turned hostile to the prosecution and have not supported the prosecution. However, for that reason the evidentiary value of the Panchnama cannot be totally washed out. If at all accused No.1 is addressed by only one name Pravingiri, he could have introduced himself as Pravingiri and not Sureshgiri. The complainant in his evidence in the Court has also identified accused No.1 as Sureshgiri being the assailant. Even though the complainant was cross-examined at length, he has all the while remained consistent that accused No.1 is Sureshgiri Gosai. Reading the cross-examination, it appears that the Court was also required to ask question regarding the identity of accused No.1 and the complainant was put the question by the Court that -

Question: Is the name of accused No.1 not Suresh ?
Answer: He is known as Suresh and I know him as Suresh.

Thus, in view of this evidence of the complainant as well as the disclosure of his name as Sureshgiri made by accused No.1 in the Panchnama , Ex.62, we are of the view that there is no case of any mistaken identity and the name of accused No.1 is Sureshgiri and is also known by that name. The learned trial Judge has therefore not properly appreciated this aspect of the identity of accused No.1. We are therefore of the opinion that the learned trial Judge was apparently misdirected with regard to the finding arrived at on the question of identity of accused No.1. Merely because nothing is mentioned about the lights at the scene of offence in the Panchnama, it is not possible for us to conclude that there was no light at all as the evidence reveals that the incident took place on a public road in the busy locality near the place where there is video threatre in absence of any suggestion to the prosecution witnesses that there was a total dark. In view of this we reject the submission of Mr. Anandjiwala that there was mistaken identity of accused No.1.

Mr. Anandjiwala then criticised the evidence of the complainant and the prosecution witnesses by contending that the prosecution witnesses by giving

inconsistent evidence have in fact changed the place of offence. According to Mr. Anandjiwala, the complainant in the complaint as well as in the FIR has given the place of incident as near Sagar Video situated in Azad Chowk. The complainant in his evidence has stated that the incident in question took place in the area known as Bhid while Fakir Mamad (PW 6) has stated that the incident in question had taken place near Regal Video.In view of this contradictory evidence, Mr. Anandjiwala submitted that the evidence of the complainant is not reliable. We see no merit in this submission. In the map Ex.25 of the scene of offence, the incident in question is described to have taken place near Sagar Video situated in the locality known as Azad Chowk. Now, except one video centre, there is no other video centre in this locality. Therefore, Fakir Mamad in his evidence has loosely used the place as Regal video Centre. He has been contradicted by his police statement wherein he has used the place as near Sagar video centre as the place of offence. Complainant Dinesh has in his complaint stated the place of incident near Sagar Video in Azad Chowk. It appears the defence has tried to create some confusion regarding the place of incident by using the word "Bhid" as the place of offence. The complainant in his evidence has also clarified that Bhid and Azad Chowk are the names used for one and the same place. The complainant has also denied that the office of the complainant as well as Sagar video are situated at a far distance. According to the complainant the distance between the aforesaid two places is one minute walking . Since we are concerned with the question regarding the place of offence which is near Sagar video, in our opinion, the evidence of the complainant has remained consistent and, therefore, it is not possible for us to hold that the complainant has changed the place of offence. In view of this, the contention regarding the change of the scene of offence advanced on behalf of the respondent-accused is rejected.

Thus, having considered the evidence of the prosecution witnesses and other documentary evidence on record, we are clearly of the view that accused No.1 is responsible for causing injuries to the complainant. However, as far as accused Nos. 2 and 3 are concerned, the prosecution has not produced sufficient evidence regarding their presence at the scene of offence and participation in the commission of the crime. Even if the evidence of the complainant is accepted regarding their presence and participation, since no injuries were found to have been caused by fist blows on the person of the complainant, we are of the opinion that their presence is doubtful and, therefore, they are entitled to

the benefit of doubt. Therefore, as far as accused Nos. 2 and 3 are concerned, no interference is called for . However, considering the injuries sustained by the complainant, in view of the medical evidence on record, we are of the view that accused No.1 is guilty of the offence punishable under Section 324 of the Indian Penal Code.

In the result, Criminal Appeal No. 214/94 is partly allowed. Respondent No.1 is convicted for the offence punishable under Section 324 of the Indian Penal Code and is sentenced to pay a fine of Rs.15,000/- in default to undergo R.I. for one year. However, at the request of Mr. Anandjiwala, the said order of sentence of fine is suspended for a period of four weeks to enable him to pay the fine.

If the amount of fine is paid by respondent No.1, the same shall be paid to the original complainant Dinesh Naran Iyer of Mandvi by the trial Court after proper verification.

Appeal against respondents Nos. 2 and 3 fails and is dismissed in so far as respondents Nos.2 and 3 are concerned.

In view of the order passed in Criminal Appeal No.214/94, Criminal Revision Application No.84 of 1994 does not survive and is accordingly disposed of. Rule is discharged.

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